Supreme Court, U.S.
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No. 01-1546

In The Supreme Court of the United States

CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,

Petitioner,

v.

DOSSEY DOUGLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether time-barred disability discrimination claims based on an express denial of employment for failure to meet a hiring standard are revived by the continuing violation doctrine where the plaintiff re-applies for the position during the limitations period and while the hiring standard is still in effect, but there is no application of the hiring standard to the plaintiff within the limitations period.

2. Whether the Ninth Circuit contradicted U.S. Supreme Court decisional authority, stating that collateral appeals of an employment decision do not serve to toll limitations periods, by concluding that the plaintiff's claims were timely under the continuing violation doctrine because he acted reasonably during the limitations period by pursuing collateral appeals of a denial of employment and re-applying for the position, rather than filing suit.

LIST OF PARTIES

Petitioner before this Court, appellee in the proceedings before the Ninth Circuit, and defendant in the case is the State of California, California Department of Youth Authority.

Respondent before this Court, appellant in the proceedings before the Ninth Circuit, and plaintiff in the case is Dossey Douglas, an individual.

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Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* 2

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* 2

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is published at 271 F.3d 812 (9th Cir. 2001) and is reprinted in the Petitioner's Appendix at App. A-1 through A-21.

The opinion of the Court of Appeals for the Ninth Circuit denying rehearing en banc, and the dissent, is published at 285 F.3d 1226 (9th Cir. 2002) and is reprinted in the Petitioner's Supplemental Appendix at Supp. App. A-1 through A-12.

The Memorandum and Order of the United States District Court for the Eastern District of California (Shubb, Chief D.J.) and the corresponding Judgment, dated August 27, 1999, are reprinted at App. B-22 through App. B-37 of Petitioner's Appendix. The transcript of the oral argument on August 23, 1999 before the District Court is reprinted in the Petitioner's Appendix at App. C-38 through App. C-76.

STATEMENT OF JURISDICTION

Respondent agrees with the Statement of Jurisdiction of Petitioner California in its Petition. Jurisdiction of this Court to review the judgment of the Ninth Circuit is based on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Respondent agrees with the listing of the Statutes Involved of Petitioner California in its Petition. The

statutes involved are the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* ("Section 504").

STATEMENT OF THE CASE

Respondent agrees with many of the basic statements of the case presented by Petitioner, and will not repeat those here. However, Petitioner both misstates matters and fails to inform the Court of information that is critical to the Supreme Court's consideration of this case.

Respondent Douglas did apply for a job as a Group Supervisor at the California Youth Authority ("CYA") in 1994. Douglas scored very highly in the examination, and was given Veteran's preference points due to his 12 years of service in the Navy. Douglas had served an extended period of time as a naval air traffic controller. In 1994 when Douglas applied for the job of Group Supervisor, the CYA had no color vision job standard. The Group Supervisor position had existed for over five decades, had never tested nor excluded anyone from the job due to color vision deficiencies, and had never had any problems due to individuals with color vision deficiencies. The California State Personnel Board ("SPB") determined in approximately 1992 to engage in evaluating and revising the job standards for the Group Supervisor position due to the passage of the ADA, to ensure that the job standards used did not screen out individuals with disabilities. In a bizarre twist, the job standards study triggered by the passage of the ADA did not remove barriers to the hiring of

individuals with color vision, but rather erected color vision barriers to hire for the first time.

In 1996, Douglas was given a conditional offer of hire as a Group Supervisor. Douglas was required to be given a physical examination, including vision testing. Douglas passed all physical examinations, and the background investigation, but did not pass the color vision testing. The color vision standards had first been adopted by the CYA to be effective June 1, 1995. The CYA grandfathered all the current employees, and has never tested the employees as of May 31, 1995 for color vision. Only new hire employees as of June 1, 1995 were subjected to the color vision standard.

1. DOUGLAS ASKED HOW HE WAS TO FILE A COMPLAINT OF DISABILITY DISCRIMINATION AND WAS DIRECTED BY DEFENDANT TO FILE WITH THE SPB AND THE CYA's EQUAL EMPLOYMENT OFFICE RATHER THAN THE EEOC.

Petitioner described that Douglas was rejected from hire by letter from the Chief Medical Officer of the CYA dated March 1, 1996 due to the results of Douglas' color vision testing. However, Petitioner failed to inform this Court of the directions the CYA gave to Douglas when the CYA informed Douglas of his rejection. In the rejection letter the CYA directed Douglas:

> "If you wish to file a formal appeal, it must be directed to the State Personnel Board of Appeals Division . . . in writing within 30 days of receipt of this letter."

No mention was made by the CYA through the letter that Douglas was to file with the EEOC to challenge the rejection due to color vision. Further, on March 24, 1996, Douglas personally went to the CYA to the Equal Employment Office and talked with the Equal Opportunity Technician and stated that he wanted to file a formal complaint of disability discrimination due to his rejection as a result of the color vision policy. Douglas was advised by the CYA EEO Technician that Douglas was to file a complaint of disability discrimination by filing it with the EEO office of the CYA. Douglas was not advised that he was to file a complaint of disability discrimination with the federal EEOC.

Douglas did file a written complaint of disability discrimination with the CYA EEO office on March 28, 1996 due to the specific directions of the CYA. The CYA EEO office denied Douglas' complaint by letter dated May 2, 1996. The May 2, 1996 letter directed that "You may appeal this determination to SPB (State Personnel Board) within 30 days of receipt of this letter." Douglas appealed the EEO decision, along with the original rejection, to the SPB, as he was directed by the CYA to do. A formal hearing was conducted by the SPB on August 13, 1996 on Douglas' complaint of disability discrimination. A decision was issued on February 19, 1997. The SPB wrote to Douglas on February 27, 1997 that if he objected to the decision of the SPB denying his complaint of disability discrimination, he could seek review by filing with the EEOC, or re-hearing with the SPB. The February 27, 1997 letter to Douglas was the first directive to Douglas that a complaint for challenging the disability discrimination due to color vision was to be directed to the EEOC. All prior directions from CYA and the SPB were specifically that

Douglas should file complaints through specific State offices, namely the California CYA Equal Employment Office and the California State Personnel Board.

Douglas did promptly go to the California deferral agency, the California Department of Fair Employment and Housing in March of 1997, that directed Douglas to the EEOC. An EEOC charge was developed and signed by Douglas on April 9, 1997, less than 45 days after the February 27, 1997 letter from Petitioner that first advised Douglas to file with the EEOC. The charge was mailed by Douglas in Sacramento to the EEOC in Oakland, California, with an EEOC filing date of April 18, 1997, only 50 days from the date of the February 27, 1997 letter. On February 23, 1998 the EEOC issued a discrimination "cause finding," based on its determination that the CYA color vision requirement for the Group Supervisor position violated the ADA.

2. DOUGLAS APPLIED FOR THE GROUP SUPERVISOR POSITION ON OCTOBER 26, 1996 AND WAS THEREAFTER DETERRED FROM RE-APPLYING FOR THE POSITION OF GROUP SUPERVISOR DUE TO THE COLOR VISION POLICY.

On October 26, 1996 the CYA conducted examinations again for the position of Group Supervisor. Douglas timely submitted a written application and took all required tests on October 26, 1996. The color vision policy of the CYA continued to be in effect and applied to all applicants. Approximately four months after being tested on October 26, 1996, Douglas on February 19, 1997 received written notice from Petitioner that Douglas' complaint of discrimination had been rejected and that he was disqualified from

employment as a Group Supervisor due to his color vision deficiencies.

Douglas continued his efforts to seek employment as a Group Supervisor. On May 5, 1997, Douglas appeared before the California Senate Rules Committee Chaired by then-Senator Lockyer, now the California Attorney General, when the Deputy Director of the CYA was before the committee. Douglas asked that his exclusion from employment as a Group Supervisor due to color vision deficiencies be considered and reversed.

In 1998, Douglas learned that the CYA was again engaging in examinations for the position of Group Supervisor. Douglas was still interested in working as a Group Supervisor. Douglas made inquiries of supervisors of the CYA to determine if the color vision policy was still in effect, and was informed that it was. As a result of the continued policy that excluded him from employment as a Group Supervisor, Douglas was deterred from re-applying in 1998.

The District Court granted summary judgment for the CYA finding that the complaint by Douglas was untimely. In the summary judgment proceedings, the CYA presented no evidence whatsoever to establish any reasons, other than application of the color vision policy, why Petitioner was not offered employment as a result of his application in 1996.

Petitioner erroneously asserts in its Petition at page 7, footnote 1, that Douglas had not contended that he was denied employment due to a discriminatory policy of the CYA. Throughout the complaint, Douglas contends that the policy of the CYA is discriminatory and continues to deter Douglas from obtaining and from seeking employment as a Group Supervisor, including specific

continuing policy allegations in paragraphs 26 though 28 of the complaint. Additionally, Petitioner in the same footnote references that Plaintiff did not "allege" that Douglas re-submitted a written application for the Group Supervisor position. However, the broad notice pleading standards in federal court do not require such a specific statement. Any effort by the footnote of Petitioner to create an inference that such an application did not in fact happen is inappropriate and false, for the record on summary judgment submitted unrefuted facts that such a re-application did take place, and re-testing was done.

REASONS FOR DENYING THE WRIT ON THE GROUNDS STATED BY PETITIONER

The sole question presented by the CYA Petition is whether the Ninth Circuit properly applied the continuing violation doctrine in reaching its conclusion that Douglas' claims were timely. First, as the Ninth Circuit ruled, the Petitioner failed in its efforts to obtain summary judgment on this issue because the factual record was inadequate to support its claims. This Court need not and cannot decide the issue of the applicability of the continuing violation doctrine based on the inadequate record presented by Petitioner CYA.

Second, in an effort to gain review Petitioner argues the existence of a conflict and an important question of federal law. However, review by certiorari is not warranted in this case because there is no conflict between the circuits, and the issues in this case are fundamentally different from the issues raised by the case of *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), cert. granted, 533 U.S. 927 (June 25, 2001) and the

other United States Supreme Court cases cited by Petitioner.

Third and finally, due to the procedural posture of the case, state law issues of estoppel and tolling must be analyzed if this Court is to consider the continuing violation doctrine on the factual record of this case. Such issues, based upon application of state law, do not raise any federal law issues, let alone any important and pressing federal question worthy of review by the United States Supreme Court.

I. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO DECIDE THE APPLICABILITY OF THE CONTINUING VIOLATION DOCTRINE ON THE QUESTIONS PRESENTED BY PETITIONER.

It is important to reference the procedural posture of this case currently. Petitioner was granted summary judgment on the issue of whether Respondent's claims were timely. The Ninth Circuit reversed, after deciding de novo, that the facts, viewed in the light most favorable to Respondent, were insufficient to support a grant of summary judgment. The facts in the record show that Respondent Dossey Douglas applied for a position with Petitioner in 1994 and again in 1996. Respondent's State Personnel Board appeal was denied in 1997, and Respondent was deterred from applying for a position in 1998 when he was informed that the discriminatory color vision policy was still in effect for the Group Supervisor position. The Ninth Circuit's opinion is a careful analysis of the specific facts in this case, as noted in the concluding paragraphs that " . . . after reviewing the facts in the light most favorable to Douglas, we conclude that he has raised

material facts about whether his claim extended into 1997 and 1998, making his claims under the ADA and Rehabilitation Act timely". The Court further remarked in a footnote that under the facts the Court " . . . could not say Douglas acted unreasonably by pursuing each avenue of appeal identified to him and by reapplying for the position."

The procedural posture of this case at the present time is not a case where a trial has been concluded and the factual record is complete and immutable. The Ninth Circuit applied the law to the facts presented, made the presumptions required by law in the light most favorable to Douglas and held that currently, Petitioner failed to present sufficient facts to obtain a grant of summary judgment on the issue of timeliness. By bringing a factually deficient record to the United States Supreme Court, Petitioner is asking the Court to look at factual issues that Petitioner wishes were in the record, not legal issues of federal significance. For example, Petitioner makes the bold assertion that the color vision policy "was not enforced to deny Respondent employment within the limitations period", specifically referring to the application submitted in October of 1996. However, in support of its summary judgment motion, Petitioner submitted absolutely no facts related to the October 1996 application and why Douglas was not offered employment. Thereafter, only four months later in February of 1997, Petitioner advised Douglas in writing that he was disqualified from hire as a Group Supervisor because of the color vision policy.

At the summary judgment phase, all reasonable inferences are to be made in favor of Douglas and against

the CYA. Due to the nature of the factual record of this case at this stage, the Supreme Court would be compelled to evaluate the continuing violation on a factual record with major voids and a wide range of potential inferences, rather than a solid factual base. The procedural posture of this case makes it clear that there are factual issues to be resolved before the Petitioner can seek to bar Respondent Douglas' claims based upon the legal issue of timeliness.

II. THE NINTH CIRCUIT'S APPLICATION OF THE CONTINUING VIOLATION DOCTRINE TO THE FACTS OF THIS CASE DOES NOT CREATE A CONFLICT WITH OTHER UNITED STATES SUPREME COURT DECISIONS, NOR WITH OTHER CIRCUITS, NOR DOES IT RAISE IMPORTANT FEDERAL ISSUES, TO JUSTIFY REVIEW.

Petitioner attempts to classify this case as being in conflict with *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), cert. granted, 533 U.S. 927 (June 25, 2001) a case recently subject to Supreme Court review. The issues presented by this case are clearly distinguishable from those reviewed in *Morgan*. The *Morgan* case deals with the application of the continuing violation doctrine to a serial case; a case where there was a series of related acts against an individual that made up a claim of racial harassment and discrimination. The employee in *Morgan* complained of a racially hostile work environment, racially biased discipline, a racially biased pay scale, and retaliation for complaining of discrimination. The employee claimed that these acts began when he was initially hired and continued until his

termination. The *Morgan* case presented the classic situation in which the Courts are asked to apply the continuing violation doctrine to a serial violation case.

At issue in the present case is the application of the continuing violation doctrine to a systemic discriminatory policy, namely the Petitioner's policy that prohibits individuals with color vision disabilities from being hired as Group Supervisors. A systemic violation is one in which a systemic policy or accepted practice of discrimination operated, in part, within the limitations period. The issues in the *Morgan* case dealt with evidence presented at trial and the jury instructions given in a case involving serial acts of discrimination and have absolutely no bearing on the continuing violation doctrine as it applies to a grant of summary judgment in a systemic policy case.

The other cases with which Petitioner attempts to manufacture a conflict in order to gain review by this Court are similarly distinguishable. *Delaware State College v. Ricks,* 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) dealt with a tenure decision that was based upon one individual's national origin. *Ricks* is again, a serial acts case, not a systemic policy of discrimination case. *Ricks* did not allege an adopted policy of ethnic discrimination that prevented his receipt of tenure, merely that at the time that his tenure decision was made, an individual making the decision had a discriminatory motive.

In *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977) the aggrieved employee originally lost her job due to a discriminatory no-marriage policy and later challenged the employer's seniority system, wherein she was not given credit for prior service. The Court concluded that the discriminatory

no-marriage policy, which had been challenged and found to be discriminatory, was changed and was not in effect at the time that she applied for rehire. Respondent in *Evans* could not complain of any current policy in effect that was discriminatory. Her complaint that the legitimate seniority system, when applied to her, had a discriminatory impact due to the prior no-marriage policy.

In the instant case, the discriminatory hiring policy of the Petitioner State of California came into existence and effect on June 1, 1995, and has been a bar to the employment of Respondent Douglas. The policy was a bar when Douglas was denied employment based on his 1994 application. The policy was a bar to employment as a Group Supervisor when Douglas applied for the job in October of 1996. The policy was a bar to his employment as a Group Supervisor when the State applied the policy to deny Douglas' State Personnel Board appeal in February of 1997 and when he was deterred from applying for employment in 1998 due to the Petitioner's insistence that the policy be applied to current applicants for the Group Supervisor position.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982) is not in conflict with the decision in this case, but actually supports the conclusion that the continuing violation doctrine is applicable to this case. In the *Havens* case, a policy of racial steering existed. Coleman was a tester and had standing to sue. She made one inquiry regarding housing and the Petitioner tried to steer her into certain housing based upon a policy of racial bias. As a tester, Respondent Coleman made no other efforts to gain housing after her one early attempt. Coleman did not go back to see if the policy regarding racial steering for housing would be

applied again, did not seek any further housing and did not seek review of the Petitioner's policy with any state, federal or local agency within 180 days of her sole attempt to obtain housing. Her claim as a tester was held to be time-barred. However, the agency for which she was working as a tester challenged the racially discriminatory steering policy even though two of its three testers were subjected to the policy more than 180 days prior to filing claims of racial discrimination in housing. In reaching its conclusion that the agency was timely, this Court in *Havens* stated:

> "We agree with the Court of Appeals that for purposes of § 812(a), a 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. See *Chase Securities Corp.* v. *Donaldson, 325 U.S. 304, 314 (1945).* Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, see *Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 (1968).* Cf. *Zipes* v. *Trans World Airlines, Inc., post,* at 398. Like the Court of Appeals, we therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice."

Havens at 455 U.S. at 380-381.

The record on appeal shows, and contains information from which the Ninth Circuit drew valid inferences, that Respondent Douglas was subjected to Petitioner's policy of discrimination in the hiring process on numerous occasions in 1996, 1997 and 1998. Under the rationale in *Havens*, Douglas' claims are claims of a systemic policy of discrimination and are timely. The cases cited by Petitioner show no conflict regarding the application of the continuing violation doctrine, eliminating any proper grounds for this Court to review the Ninth Circuit's ruling regarding the timeliness of Respondent Douglas' claims.

III. THE RECORD REGARDING THE TIMELINESS OF RESPONDENT'S CLAIMS COMPELS THIS COURT TO ANALYZE STATE LAW ISSUES OF EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS FOR WHICH THERE ARE NO GROUNDS FOR REVIEW BECAUSE NO FEDERAL QUESTION IS PRESENTED.

If this Court grants review of the instant case based on the application of the continuing violation doctrine, the Court will also have to examine whether or not the statute of limitations was tolled. The Ninth Circuit did not have to look in detail at the factual or legal issues regarding tolling because it concluded that the claims of Respondent were timely. However, if the Supreme Court is to consider the issue presented by Petitioner for review, the factual basis for and legal issue of tolling must be addressed. The Ninth Circuit's conclusion that Respondent "acted reasonably" is a factual issue that is directly relevant and related to the issue of tolling and would need to be addressed.

In determining whether the statute of limitations is tolled, the Court must look to the law of the state of California regarding tolling. This Court did directly hold that state tolling provisions were to apply to civil rights statutes. The Supreme Court stated: ""No federal policy – deterrence, compensation, uniformity, or federalism – [is] offended by the application of state tolling rules." *Chardon v. Fumero Soto,* 462 U.S. 650, 657, 103 S. Ct. 2611, 2616, 77 L. Ed. 2d 74, 81 (1983). See also, *Ellis v. City of San Diego,* 176 F.3d 1183, 1189 (9th Cir. 1999) "Equitable tolling of the statute of limitations is a defense to all federal statutes of limitations, even those expressly contained within a given cause of action, unless tolling would be inconsistent with the legislative purpose". The Fifth Circuit has held that pursuit of a grievance before a county personnel board was entitled to equitable estoppel tolling. The Fifth Circuit held that since the state involved would have tolled the statute of limitations during the administrative grievance, under Supreme Court precedent, the tolling was consistent with the policies underlying the federal statute (Section 1983) involved, and tolling should be allowed. *Rubin v. O'Koren,* 644 F.2d 1023, 1025 (5th Cir. 1981) [citing *Board of Regents v. Tomanio,* 446 U.S. 478 (1980).] The Ninth Circuit revisited the legal standard for equitable tolling in a case of disability discrimination under the Rehabilitation Act and held that California's equitable tolling principles were applicable to that disability discrimination case. *Daviton v. Columbia/HCA Healthcare Corp.,* 241 F.3d 1131, 1136-1139 (9th Cir. 2001). The Ninth Circuit also noted that there was no dispute "that the equitable tolling rules of California, together with the state's statutes of limitations, can be applied without intruding upon any . . . federal policy." *Id.* 241 F.3d at p. 1141.

Respondent claims that the statute of limitations was tolled during the pendency of his appeal before the Petitioner's State Personnel Board. Therefore, in the event that the claims of Respondent Douglas are called into question on the present Writ under the continuing violation doctrine, this Court will be compelled to look at California's equitable tolling rules, which are clearly matters of state law, which do not implicate any federal issues. A complete lack of any important federal question or issue, and the existence of state law issues makes review by this Court unnecessary.

CONCLUSION

For the reasons stated, the petition for certiorari filed by the State of California should be denied.

Dated: May 20, 2002

Respectfully submitted,

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Dossey Douglas